

1505119 (Migration) [2016] AATA 4605 (2 November 2016)

1.

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Mr Nikica Brekalo

VISA APPLICANT: Ms Snezana Gladovic

CASE NUMBER: 1505119

DIBP REFERENCE(S): BCC2014/1087093 OSF2014/012128

MEMBER: Adrienne Millbank

DATE: 2 November 2016

PLACE OF DECISION: Brisbane

DECISION: The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

- cl.309.211 of Schedule 2 to the Regulations
- cl.309.221 of Schedule 2 to the Regulations

STATEMENT MADE ON 02 NOVEMBER 2016 AT 10:56AM

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration on 13 February 2015 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
3. The visa applicant applied for the visa on 29 April 2014 on the basis of her relationship with her sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 because she was not satisfied that the relationship between them was genuine and continuing. The delegate cited the short period of time (three months) between first meeting and marriage, and the paucity of supporting evidence.
5. The review applicant appeared before the Tribunal on 28 September 2016 to give evidence and present arguments. The Tribunal took evidence from the visa applicant who was in Serbia over the phone with the assistance of an interpreter.
6. The review applicant was represented in relation to the review by the registered migration agent Mr Bernard Kersting. Mr Kersting was not employed by Mr Brekalo at time of review, but assisted the applicants and attended the hearing in a pro-bono capacity.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

BACKGROUND

8. The applicant Ms Snezana Gladovic is a Serbian national born 17/09/1961. She divorced from her first husband, in Serbia, on 16 September 2012. She has two adult, non-dependent children from this marriage.
9. The applicant first arrived in Australia on a 6-week business visitor visa (with a no further stay, 8503 condition) on 16 September 2013. She was a crane-operator by profession at the time, and was in Australia with the stated purpose of undertaking training in order to open a branch office, in Serbia, of her sister's company.
10. The applicant is now living in Serbia with her daughter, and is not employed.
11. The sponsor Mr Nikica Brekalo was born 15/10/1958 in Yugoslavia and is an Australian citizen (since 4 May 1976). He divorced from his first wife in 2006. He has five sons, all adult and non-dependent, from this marriage.
12. Mr Brekalo is a pipe-fitter and welder who has worked in the resources industry. At time of application he lived, and his family (sons, daughters-in-law, nephews and nieces) still live, in Perth. He is currently based in Darwin but claims to have travelled and lived overseas for extended periods over the last two years with the visa applicant.
13. The sponsor and applicant claim that they met at the applicant's workplace, and that as they both worked in the same trade industries, were both about the same age, both divorced and lonely, and both from the same cultural backgrounds, they quickly established a relationship.

14. The applicant and sponsor became engaged on 15 October 2013 and married on 3 December 2013.
15. The applicant requested waivers of the no-further-stay condition on her business visitor visa so as to enable an on-shore partner application. These requests were refused. Bridging visas (WE 050) were granted until the applicant departed Australia 12 March 2014, with a three-year exclusionary period. Applications for visitor visas were refused on 16 April and 7 October 2014.

EVIDENCE CONSIDERED

16. Evidence on the departmental file included: the history of the applicant's visa applications and refusals; a copy of the visa and review applicants' certificate of marriage, issued by the Perth, WA Registry of Births, Deaths and Marriages, dated 3 December 2013; written statements from the sponsor and applicant; a supporting statutory declaration by Mr Leonard Mudri dated 6 December 2013; supporting written statements dated 6 December 2013 by Nickolas and Steve Brekalo, sons of the sponsor, and a longer written statement of support by Nickolas Brekalo dated 11 July 2014.
17. Evidence provided to the Tribunal before hearing included: a copy of a letter from the applicant dated 3 April 2014 requesting waiver of PIC 4014 (her three-year exclusion from visiting Australia); a written statement by Ms Svetlana Biondic vouching for the relationship; and a copy of a letter from the ANZ bank (Spearwood WA Branch) to the applicant ('Mrs Brekalo') dated 4 December 2013 confirming her access to the sponsor's bank account.
18. Written statements were provided by the sponsor and the sponsor's solicitor and pro-bono agent Mr Bernard Kersting which argue that the sponsor and applicant were misguided about the requirements for a partner visa by their former agent, and that it was their consequent misunderstanding and confusion that led to the applicant's visa problems.
19. Oral evidence was given at hearing by the sponsor and applicant, and concluding comments offered by Mr Kersting. At hearing, the sponsor showed the Tribunal photos of him and the applicant taken during his periods overseas since December 2013, including in Vietnam, Indonesia, Bosnia and Serbia, as a couple and with friends and family of the applicant.
20. After the hearing the sponsor provided, through Mr Kersting, a letter from the ANZ bank dated 29 September 2016 confirming the applicant's continuing access to the sponsor's account, and copies of bank statements of transactions for this account over the period June 2013 to November 2016.

CONSIDERATION OF CLAIMS AND EVIDENCE

21. The issue in the present case is whether the visa applicant and her sponsor were at time of visa application and continue to be at time of decision in a genuine and continuing spousal relationship to the exclusion of others, as required under Australian migration law.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

22. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.

23. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.
24. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

FINDINGS AND REASONS UNDER R.1.15A(3)

FINANCIAL ASPECTS OF THE RELATIONSHIP

25. At hearing, the sponsor said that the applicant was no longer employed, that she was living (during the times the sponsor was in Australia) with her daughter in Bosnia, that he had supported his wife since his marriage and that she is currently fully dependent on him.
26. The applicant confirmed at hearing that she was not working and that she was totally dependent on the sponsor. She said she withdrew money from his account once a week, for living expenses, while she was living with her daughter and not travelling or living with her husband.
27. The sponsor said that as his wife couldn't be in Australia, he had decided that he would have to be with her, overseas, when he could. He described how he worked in the resources sector, including in fly-in-fly-out jobs, and earned sufficient to fund extended periods overseas. He said that visa requirements meant that he and his wife had to move between Bosnia and Serbia, and that they had also spent extended periods living together in Indonesia, Thailand and Vietnam.
28. Letters from the sponsor's bank confirm that the applicant has had access to the sponsor's bank account since 4 December 2013, and statements of transactions over the period June 2013 to September 2016 confirm withdrawals from this account over this period including in Indonesia, Thailand, Vietnam, Croatia, Serbia and Bosnia.
29. The Tribunal is satisfied that the sponsor and applicant have pooled their financial resources, and that, commensurate with a spousal relationship, the sponsor supports the applicant during the times she lives apart from him in Serbia.

NATURE OF THE HOUSEHOLD

30. The sponsor's movement records show that he has travelled often, spending weeks and months at a time overseas. At hearing he told how he and his wife lived relatively cheaply, and happily, for months in Vietnam, until their funds ran out and he had to return to work for a while in Australia. He said (as noted above) that while in the applicant's home region they had to move between Serbia and Bosnia because of the sponsor's visa limitations, but that they earned enough prospecting for gold in Bosnia to support themselves for months.
31. At hearing the sponsor showed the Tribunal photos of the couple while living overseas, including several in Bosnia showing the water-driven sand-sieving machine constructed by Mr Brekalo and the tent that he and the applicant lived in while prospecting for gold.

32. The Tribunal is satisfied that, to the extent possible during times when the sponsor has travelled and lived with the applicant overseas, they have established and shared households together as a genuine spousal couple.

SOCIAL ASPECTS OF THE RELATIONSHIP

33. The sponsor and applicant married after a brief relationship of just two and a half months. Their wedding in Perth was attended by two of the sponsor's sons, and another son, Nickolas, met the applicant at her sister's home after the wedding.
34. At hearing, the sponsor said that he had met (in Serbia) the two (adult) children – and the ex-husband - of the applicant, and that they all accepted and acknowledged the marriage.
35. The sponsor's sons Steve and Nickolas Brekalo provided written statements dated 6 December 2013 that they had known the applicant since 17 September 2013, and that they attended the wedding (Steve) or got to know the applicant as their father's wife after the wedding (Nickolas).
36. A friend who has known the sponsor for 36 years, Mr Leonard Mudri, testified in his sworn statement of 6 December that he has known the applicant for three months, and that the relationship is genuine.
37. Photos provided to the Tribunal at hearing showed the couple with family and friends.
38. The Tribunal is satisfied that the parties represent themselves to other people as being married to each other, that their adult children know about and approve of the relationship, and that the parties, to the extent that they can while living in different countries, undertake social activities jointly.

NATURE OF PERSONS COMMITMENT TO EACH OTHER

39. A written statement by Ms Svetlana Biondic confirmed that Snezana Brekalo and Nick Brekalo lived with her and her family from 15 October 2013.
40. The sponsor provided evidence and talked at hearing about how he and the applicant have spent all the time they could, over the last two and a half years, together.
41. The sponsor's son Nickolas, in his longer written statement, described at length the positive effect on his father of his relationship and marriage to Snezana: how his father changed from a person who was miserable and gambling to one who is supportive and caring. He described how the applicant had quickly become part of the family and had bonded with his young children, and how they keep in touch over the phone.
42. In explaining the precipitous nature of the relationship and marriage, Nickolas Brekalo described the sort of person his father is and the way he leads his life: '... very little change for 90 per cent of the time. Then, every few years, he makes major changes and takes on new chances and challenges. He doesn't live his life the way most people live theirs'. Nickolas Brekalo offered to reiterate his witness statement in support of his father's marriage at hearing, over the phone. The Tribunal finds his testimony, and the testimony of his brother Steve, who also described his father as getting a new lease on life after meeting and marrying Snezana, to be sincere and compelling.
43. At hearing the applicant explained the shortness of time between her meeting and marrying Mr Brekalo as due to their maturity and compatibility. They were both in their fifties, had been through divorces, had adult children who were no longer dependent, were lonely, came

(originally) from the same region in Europe, and were in the same line of work. She said that they just wanted to be together for what remained of their lives.

44. Photos provided by the sponsor at hearing showed a couple comfortable in each other's company. The Tribunal is in no doubt that the sponsor and applicant are each other's main source of companionship and emotional support, and that they both see the relationship as long-term.

ANY OTHER RELEVANT CONSIDERATIONS

45. The sponsor at hearing asserted strongly that it was never his nor the applicant's intention that she should overstay a visa. He said that he had been poorly advised by their first migration agent; their only intention was to extend the applicant's stay while they explored options for her to remain in Australia so they could be together. The Tribunal found the sponsor to be genuine and convincing in his explanation of this issue.
46. At the conclusion of the hearing the Tribunal asked the sponsor's solicitor and de-bono agent Mr Kersting whether he wanted to add anything on behalf of the applicants. Mr Kersting did. He said that he had remained in contact with the sponsor and applicant since 2014, and that he had witnessed their efforts to be together and their frustrations over visa issues. He said that he could personally attest to the genuine nature of the relationship, and that if he could provide a character reference for Mr Brekalo, he would.

CONCLUSION

47. Having considered all the evidence and r.1.15A(3) matters, the Tribunal finds that the sponsor and applicant meet the requirements of s.5F(2)(b)-(d). It finds that they have a mutual commitment to shared life to the exclusion of others; that they are in a genuine and continuing relationship; and that they live together and not separately and apart on a permanent basis.
48. Given these findings the Tribunal is satisfied that at the time the visa application was made and the time of this decision the parties were in a spousal relationship.
49. Therefore the visa applicant meets cl.309.211 and cl.309.221.
50. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

51. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
- cl.309.211 of Schedule 2 to the Regulations
 - cl.309.221 of Schedule 2 to the Regulations

Adrienne Millbank
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).